IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-733

LONG ISLAND LIGHTING COMPANY,
—against— *Petitioner,*

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
—against— *Petitioner,*

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMICUS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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Pursuant to the provisions of Section 42 of the Rules of this Court, the Public Service Commission of the State of New York (PSC) files this brief amicus in support of the petition for a writ of certiorari filed in this proceeding on November 18, 1975 by Long Island Lighting Company (Lilco) and Consolidated Edison Company of New York, Inc. (Con Edison). For the reasons set forth below, PSC believes the petition presents extremely serious issues not previously resolved by the Court as to the nature of the parties who have standing to bring private damage actions for violations of the Federal antitrust laws. In our opinion, the protection of the rate payers of utilities from exploitation by the purveyors of the fuels upon which such utilities must depend will be seriously jeopardized unless the Court determines that utilities in situations such as Lilco and Con Edison found themselves in the instant proceeding have standing to challenge concerted actions by fuel suppliers which, as they were aware, would necessarily result in serious injury to the utilities and their customers.

The Interest of the Amicus

The amicus, Public Service Commission of the State of New York, is an administrative body established pursuant to the authority of the New York Public Service Law, Chapter 48, Consolidated Laws of New York, to exercise regulatory control over the rates-and services of public utilities distributing gas, electric, steam and water services within the State. Lilco is a public utility providing gas and electric service to approximately 840,700 customers in the Long Island area in territory comprising a portion of Queens County and all of Nassau and Suffolk Counties in the State of New York. Con Edison provides electricity to approximately 2,846,300 customers located within all five Buroughs of the City of New York and a portion of Westchester County in New York State. Con Edison also provides gas and water service

to a large number of customers located within this territory.

The rates at which Lilco and Con Edison provide electric service to their customers are subject to the regulatory control of the Commission and specifically its authority under Sections 65 and 66 of the New York Public Service Law to determine and fix the just and reasonable rates for such service. Under established rate procedures the expenses for fuel in operating the generating plants of Lilco and Con Edison are included in the cost-of-service upon which their rates are determined and both utilities have been authorized to include in their tariffs "fuel adjustment clauses" under which their rates are automatically adjusted at various intervals to reflect systemwide increases or decreases in fuel costs.

The increased costs for low sulphur oil, which Lilco and Con Edison were and are required to use in a number of their existing generating stations in the light of environmental requirements, which resulted from the actions complained of here were passed on to the customers of the utilities. Similarly, if the utilities recover damages from respondents here on account of the excess payments for fuel oil they were forced to incur as a result of respondent's actions, all such sums recovered, including treble damages related to the costs of fuel consumed, would be passed on to the rate payers of the two utilities by means of the fuel adjustment clauses, in a manner that would be prescribed by the Commission.

As the Complaints assert, and is not to the best of our knowledge contested, utilities along the eastern seaboard of the United States, including Lilco and Con Edison, have long been dependent for much of their fuel upon imported oil. With the emergence of a need for low sulphur oil to meet governing air pollution standards, the principal source of the low sulphur oil utilized by Lilco and Con Edison was Lybia. As a result, any

boycott of Lybian oil exports to the United States was, as the respondents were aware, certain to affect the utilities and through them, their electric customers.

It is clear that if the two utility petitioners lack standing to sue, as the Courts below held, then no one can sue for any damages which the respondents' action may have caused the utilities and their customers. For if the utilities are "too remote" from the focus of the conspiracy as the Court of Appeals held, then by definition so are their customers, and the PSC or any other representative of New York State which might otherwise have the authority and practical capability of bringing an action on behalf of New York consumers. The PSC is, accordingly, vitally interested in the petition for a writ of certiorari, since, unless this Court accepts the case for consideration on its merits, there is no way in which New York consumers can hope to be made whole for the damages they have incurred. In addition, the PSC has a substantial interest in the general question raised by the lower court's decision since under its reasoning suppliers of natural gas to New York distribution utilities, or other major items upon which the New York utilities are dependent, would apparently not be subject to liability for damages caused the utilities and their customers by their actions in violation of the antitrust laws whenever they could persuade a court that the principal object of their actions was some other person or group.

ARGUMENT

The Court Of Appeals' Determination That The Utilities Lack Standing Because They Were Not In The Target Area Of The Alleged Conspiracy Raises Serious Questions As To The Efficacy Of The Provisions Of The Antitrust Laws Permitting Private Damages Actions Which This Court Should Review.

The Court of Appeals decision below concluded that the two utilities who, with their customers, were the primary United States victims of the group boycott asserted in Count I of the Complaint were not within the "target area" of the boycott, and thus were "too remote" from the alleged antitrust violation to have standing to bring their action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26. We agree with the Petition for a Writ of Certiorari that the Second Circuit's formulation of the target area concept as applied in this case is in direct conflict with the standing formulations followed by the Ninth and Sixth Circuits. For this reason alone, the case merits plenary review by this Court to establish, as it has not hitherto done, the appropriate standard to be followed by the lower courts in determining whether private parties have a sufficient interest in alleged violations of the Federal antitrust laws to secure a resolution of the merits of their claims. We are filing this amicus pleading, however, because of the PSC's strong feeling that, whatever the appropriate general standard may be, it is essential that utilities be entitled to seek damages on behalf of themselves and their customers in situations such as those alleged to exist here where the objectives of the asserted conspiracy could, as the parties thereto were well aware, only be achieved at the utilitities' expense and the means for carrying out the conspiracy involved actions intended to restrict the utilities' access to vital fuel supplies.

We assume *arguendo*, that the first count of the complaints involved in this case asserted a conspiracy

among the various oil company defendants whose primary objective was the maintenance of their ownership position in the Persian Gulf and to a lesser extent in Lybia. But, as the Complaints made clear (Pet. App., A-41, A-65), Lybia was the primary world source of the low sulphur oil upon which the eastern seaboard utilities, including Lilco and Con Edison, were dependent. A boycott of Lybian oil would, therefore, necessarily have as its principal victims the east coast utilities and their customers who would have to go without the low sulphur oil which they needed or, to the extent that the boycott proved less than fully effective, pay substantially more for such oil. Moreover, as the complaint also charged (Pet. App. A43-46, A67-70), in order to effectuate their plan, the defendants found it necessary to move from group action to boycott Lybian oil to actions calculated to preclude any other party from securing low sulfur oil from Lybia for transshipment to the eastern seaboard utilities. In short, to achieve the asserted objectives of the conspiracy it was essential that all possible efforts be undertaken to preclude Lybian oil reaching the utility plaintiffs. That the defendants were not entirely successful in their endeavor and instead only succeeded in raising the cost of such oil does not affect the thrust of their action.

Under such circumstances we believe that, regardless of the appropriate general standard for evaluating the standing of private parties to bring antitrust damage actions, the utilities must be considered to be sufficiently direct and intentional victims of the alleged conspiracy to have standing to secure a determination of the merits of their claims. It is, of course, apparent that if the test is whether a plaintiff's business is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry" (*Kanseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 362 (9th Cir., 1955), the east coast utilities who necessarily

would be a primary victim of any successful boycott of Lybian oil would have standing. This also would be the case if the appropriate standard was the one recently enunciated by the Sixth Circuit in *Malamud* v. *Sinclair Oil Corp.*, 1975-2 Trade Cases ¶ 60,442 (6th Cir., 1975) where any "target area" or "direct injury" concept of defining standing in private antitrust cases was rejected in favor of a test analogous to that prescribed by this Court for appeals for decisions of administrative agencies in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). There, in addition to alleging that the defendants action caused the plaintiffs injury, it is necessary to show only that "the interest sought to be protected . . . is arguably within the zone of interests to be protected" by the antitrust statutes invoked. There can be no doubt that the Sherman Act was intended to protect consumers from just such effects of unlawful concerted action by competitors as resulted in the injury to the utilities here. Even assuming, however, the general validity of the "target area" concept as enunicated by the Second Circuit, despite its *ipse dixit* approach as to what is and is not within the sights of the conspirators' plan of action, the allegations in the Complaints in the instant case were, we suggest, more than adequate to support standing.

There may be valid reasons for the Courts to limit the extent to which parties with purely peripheral interests in actions allegely in violation of the antitrust laws may file damage actions. See *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263, n. 14, but see *Mandeville Island Farms* v. *American Crystal Sugar*, 334 U.S. 219, 236; *Radovitch* v. *National Football League*, 352 U.S. 445, 453-454. No such considerations can properly immunize the international oil companies from suit by the domestic interests primarily affected by joint actions in violation of Sherman Act because the injury to such parties, though the inevitable and necessary result of

the defendants' plan of action, was arguably incidental to their primary objectives. Yet if the utilities have an inadequate interest to seek damages in the present situation then, for all practical purposes, there can be no private antitrust protection against many if not most of the concerted actions which could be taken by the oil companies to the substantial injury of the utilities and the rate payers dependent thereon. A "target" does not necessarily contain only one potential victim and the antitrust laws were, in our view, intended to protect all persons whose interests necessarily or probably would be adversely affected by concerted actions in violation of their substantive standards.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari presents novel questions of great importance to the enforcement of the antitrust laws through private damages actions. It should, therefore, be granted and the case set for hearing on its merits.

Respectfully submitted,

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